In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1084

FAY ANDERSON, PETITIONER

v.

EARL J. LANGENWALTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks to recover damages from certain Internal Revenue Service officials, alleging that they illegally searched his office, seized certain records and falsely arrested him or that they were responsible for that allegedly unlawful activity. The district court granted summary judgment against petitioner (Pet. App. 2a-9a) and the court of appeals affirmed (Pet. App. 1a).

The pertinent facts are as follows. Petitioner was in the business of preparing tax returns. Two agents

in the Internal Revenue Service, Donald E. Archer and Earl J. Langenwalter, employed petitioner to prepare their tax returns on the basis of data they supplied to him (R. 37, 41).[1] Sometime later, another Internal Revenue Service agent, Charles Lindsay, visited petitioner's office and, after informing him of his rights, asked to examine his files. Petitioner gave the agent permission to examine the files and further agreed to let him take certain of the files back to his office (R. 9). On the basis of information derived from petitioner's files, and interviews with certain of petitioner's clients, Agent Lindsay filed a complaint against petitioner before a United States magistrate, charging petitioner with aiding and assisting in the preparation and presentation of false and fraudulent income tax returns in violation of 26 U.S.C. 7206(2) (R. 13-14). Pursuant to an arrest warrant issued by the magistrate (R. 15), Lindsay arrested petitioner at his office and immediately took him before a magistrate, who set a date for a preliminary hearing and released petitioner on his own recognizance (R. 18). After presentation of evidence at the preliminary hearing, the magistrate dismissed the charges against petitioner (R. 4).

Petitioner thereupon instituted these damage actions. In the first suit, he sued Agents Langenwalter and Archer for having given him "false and fraudulent" information upon which he had based the tax

[1] "R." references are to the record appendix in the court of appeals.

returns he had prepared for them. He asserted that his preparation of those returns had led to his being illegally searched and arrested (R. 37-39). In a second action, he sued Agent Charles Lindsay and other internal revenue agents for illegally searching and arresting him and for damages arising from their retention of his files (R. 2-5).

The district court found that petitioner had given Agent Lindsay permission to examine his files and remove them for further examination and that petitioner's arrest had been made pursuant to an arrest warrant issued by a magistrate (Pet. App. 5a-7a). It entered summary judgment against petitioner, on the ground that the agents had acted in good faith and within the scope of their duties and were therefore immune from suit (Pet. App. 5a-7a). The district court also dismissed petitioner's action against Agents Langenwalter and Archer for failure to state a claim upon which relief could be granted (Pet. App. 2a-3a).

1. The record clearly establishes that the internal revenue agents did not inflict any actionable harm upon petitioner. Agents Langenwalter and Archer merely employed petitioner to prepare income tax returns. The fact that the information they supplied to him was not based upon their own economic experience (or, indeed, upon any other known individual's experience) can hardly be considered actionable. And the subsequent investigation of petitioner's tax preparation business which culminated in his arrest was equally free from wrongdoing.

Petitioner consented to the search Agent Lindsay made of his records and to his removal of certain of those records for further study. On the basis of the information derived from petitioner's records, the magistrate issued a warrant for petitioner's arrest. Armed with that warrant, Lindsay thereafter arrested petitioner and immediately brought him before a magistrate.

The whole pattern of conduct here is free of any misconduct by the agents. The search of petitioner's records was made with his consent. Despite the fact that the charges against petitioner were subsequently dismissed, the arrest was made pursuant to a warrant which had been properly issued upon probable cause. Under such circumstances, the courts below correctly dismissed petitioner's actions against the internal revenue agents.

2. Petitioner argues (Pet. 6-8) that the decision below conflicts with *Bivens* v. *Six Unknown Agents*, 456 F.2d 1339 (C.A. 2), *Apton* v. *Wilson*, 506 F.2d 83 (C.A.D.C.), and *Jones* v. *Perrigan*, 459 F.2d 81 (C.A. 6). Those decisions hold that federal officers performing police functions are not absolutely immune from suit, but are immune from suit only as long as the acts they perform are carried out in good faith and in the reasonable belief that those acts are lawful.

Petitioner's assertion of conflict is grounded on the erroneous assumption that the decision below held the defendants absolutely immune from suit (Pet. 6). But the district court in this case did not conclude that the defendants were immune as a matter

of law. To the contrary, it determined that the agents were immune from suit because the record established that the agents' acts were within the scope of their duties, were undertaken by them in good faith, and were lawful. This is more than is necessary to sustain the defense under the cases cited by petitioner, which require that the officials hold a reasonable belief in the legality of their actions.

3. Finally, petitioner argues (Pet. 7-9) that the district court erroneously entered summary judgment against him. But this Court noted in *Scheuer* v. *Rhodes*, 416 U.S. 232, 250, that summary judgment may properly be granted in cases involving issues of official immunity, if there are no genuine issues for trial. Here, there are no disputed facts which required resolution in a trial. Indeed, petitioner never attempted to controvert the factual showing that none of his rights had been violated, and that the search, seizure and arrest of which he complained had been undertaken by federal officials who were in good faith performing their duties in what they reasonably believed to be a lawful manner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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